

New York Civ. Liberties Union v New York City Police Dept.
2022 NY Slip Op 30659(U)
March 1, 2022
Supreme Court, New York County
Docket Number: Index No. 158971/2021
Judge: Arlene Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE BLUTH **PART 14**

Justice

-----X

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

- v -

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

-----X

INDEX NO. 158971/2021

MOTION DATE 02/25/2022

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 13, 25, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for RELEASE RECORDS- FOIL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 28

were read on this motion to/for INTERVENE.

This petition seeks an order directing that respondent provide information sought in petitioner's FOIL request dated April 30, 2021. Motion Sequence numbers 001 and 002 are consolidated for disposition. The cross-motion to dismiss the petition (MS001) for a judgment is granted and the petition is denied. The motion (MS002) by non-party the Police Benevolent Association of the City of New York ("PBA") to intervene is denied as moot.¹

Background

Following the repeal of Civil Rights Law § 50-a, petitioner submitted a FOIL request to respondent for records related to respondent's misconduct and disciplinary databases; that

¹ The PBA's moving papers focus almost exclusively on how the Court should interpret the repeal of Civil Rights Law § 50-a. However, that issue is irrelevant to this particular decision. Therefore, the Court finds no reason to permit PBA's intervention at this time.

request was made on April 30, 2021 (NYSCEF Doc. No. 4). The request asked respondent for documents sufficient to identify all databases about complaints or reports of misconduct against respondent's employees, information about the databases themselves and specific information about the complaints (*id.*).

On May 5, 2021, respondent denied the request in full on the ground that the request "is too broad in nature and does not describe a specific document" (NYSCEF Doc. No. 5). Petitioner then sent a letter appealing what it characterized as a "conclusory one sentence denial" and reiterating its basis for disclosure of the documents (NYSCEF Doc. No. 6). That very same day, respondent rejected this follow up request and concluded that the request "does not reasonably describe a specific record in a manner that could lead to its retrieval" (NYSCEF Doc. No. 7). Respondent noted that the records described in item 1 of petitioner's request would require the creation of a new record, while paragraphs 2, 3 and 4 did not provide enough detail to describe a record.

Petitioner then commenced this proceeding. Respondent cross-moves to dismiss on the ground that petitioner failed to name a specific database or databases. It points out that petitioner does not name any specific instances or occurrences that form the basis of this request nor is a time frame included to limit the scope of the request. Respondent also objects to the terms in the request such as "document sufficient to justify all databases" and claims this imposes a subjective standard on respondent to make a determination about what documents might fall under this standard.

Respondent characterizes the requests as akin to interrogatories rather than a proper FOIL request. It insists the request is overbroad because it does not identify a record and instead uses

the term database. Respondent notes that database could be an Excel spreadsheet maintained by individual supervisors or one created by an investigator.

In opposition to the cross-motion, petitioner insists that the records it sought were reasonably described. It claims it described the databases sought, identified the key fields requests and even identified a publicly available example. Petitioner also maintains that its request was narrowly targeted and that these databases can be readily exported. It points out that following the commencement of this proceeding, respondent confirmed the existence of six responsive databases and related manuals. Petitioner argues that it offered to negotiate a resolution regarding disclosure about these databases but respondent refused.

Petitioner argues that any claims about how voluminous or burdensome the request does not compel the Court to grant the cross-motion because petitioner has offered to discuss a solution, such as rolling production timelines, prioritizing certain entries or additional resources for redactions.

Discussion

As an initial matter, it is critical to articulate exactly what this proceeding involves and what it does not. This petition seeks a review of the specific denial of the April 30, 2021 FOIL request, which was based on respondent's view that the request did not reasonably describe the records sought. Any negotiations that were held after the request was made are not relevant to this petition, nor are reasons to deny not advanced by respondent.

Although the substance of the request seeks information related to the recently repealed 50-a, the Court need not reach the merits of whether such information falls under a FOIL exemption because respondent did not cite that as a basis for its denial. Petitioner and proposed-

intervenor devote ample time to discussing the impact of the repeal of 50-a on FOIL requests, but this Court finds those arguments to be irrelevant here. The Court can only consider the basis for the denial of the FOIL request cited by respondent. That justification was that the request was not sufficient to reasonably describe a record to search. It was not whether the substance of the request was exempt from disclosure under the FOIL exemptions cited by the proposed-intervenor.

“All government records are thus presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions . . . [B]lanket exemptions for particular types of documents are inimical to FOIL’s policy of open government. Instead, to invoke one of the exemptions of section 87(2), the agency must articulate [a] particularized and specific justification for not disclosing requested documents” (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274-75, 653 NYS2d 54 [1996] [internal quotations and citations omitted]).

An agency may deny a FOIL request on the ground “that the records sought were not ‘reasonably described,’ as required by Public Officers Law § 89(3)(a)” (*Aron Law, PLLC v New York City Dept. of Educ.*, 192 AD3d 552, 552, 146 NYS3d 7 [1st Dept 2021], lv to appeal denied, 37 NY3d 907 [2021] [citation omitted]). “[T]he requirement of Public Officers Law § 89(3) that documents be “reasonably described” was to enable the agency to locate the records in question” (*Matter of Konigsberg v Coughlin*, 68 NY2d 245, 249, 508 NYS2d 393 [1986] [citation omitted]). An “agency had to establish that the descriptions were insufficient for purposes of locating and identifying the documents sought” (*id.* [quotation and citation omitted]).

An evaluation of the request supports respondent’s justifications for denying the FOIL request. Petitioner demanded in paragraph 1 “Documents sufficient to identify all databases maintained by or on behalf of the Department that include information about (a) complaints or

reports of misconduct against Department employees, or (b) discipline of Department employees in response to a complaint or set of complaints” (NYSCEF Doc. No. 4).

As respondent points out, that reads more like a discovery device, such as a request to admit or an interrogatory. And it raises questions about how respondent could satisfy that request. How could respondent be assured it turned over “documents sufficient to identify” all databases? Moreover, how could this Court fashion an order to ensure respondent complied with the request? The point is that the request does not ask for specific documents; instead, it wants documents to support petitioner’s contention. The Court finds that such a request does not reasonably describe a record subject to disclosure under FOIL.

“[A]n agency has no duty to create documents that are not in existence” in response to a FOIL request (*Brown v New York City Police Dept.*, 264 AD2d 558, 561-62, 694 NYS2d 385 [1st Dept 1999]). That is exactly what the FOIL requests here seem to request, for, particularly for paragraphs 1 and 2, which seek information *about* the purported databases rather than information *from these databases*. FOIL does not require respondent to generate documents identifying the databases it has and information about these databases.

Similarly, the demands contained in paragraphs 3 and 4 of the request were properly denied as they ask for records from unspecified databases and the requests themselves are too vague. Petitioner seems to be asking for access to all databases that contain certain information (identified under subparagraphs a-f in paragraph 3 and a-e in paragraph 4). However, the specific information sought (such as name, position and outcome) is inclusive, not exclusive, meaning any “database” that has any of this additional information would appear to be responsive to the request.

As respondent noted in its denial with respect to these paragraphs, “It is unclear, first, which databases are responsive to your request because no actual databases are identified. Your request is overbroad in that the scope of records responsive to your request cannot be determined since a “database” could include not only Department-wide systems but also documents like Excel spreadsheets maintained at a precinct-level by individual Integrity Control Officers or other supervisors” (NYSCEF Doc. No. 7 at 2). Respondent is correct that the scope of this request is overbroad and does not reasonably describe a record respondent could simply disclose. Would emails about an officer’s alleged misconduct held by a supervisor constitute a database that needs to be searched? Is that a database? Again, as stated above, this Court’s concern is that it would be impossible for this Court to ensure that respondent actually complied with an order requiring it to disclose the requested information given the unclear scope of this request.

The Court emphasizes, however, that this decision does not credit respondent’s argument that somehow a FOIL request that seeks copies instead of actual records (NYSCEF Doc. No. 7 at 2) renders a FOIL request as improper. The distinction between seeking a copy rather than an actual record is of no significance. Moreover, while binding precedent in FOIL case law holds that an agency cannot be forced to create records, that does not mean an agency can store its records in a way that prevents all disclosure. In other words, it is not sufficient for an agency to create a database, actively use that database and then claim the records are not subject to disclosure because the information cannot be exported. That leaves the public in the dark, which is contrary to the purpose of FOIL.

More broadly, the reply papers from petitioner make clear that the proper course is for petitioner to simply make a new FOIL request. It claims that since the commencement of this proceeding, it learned through publicly available information about two specific databases

(ICMS and ICMT) used to track misconduct complaints and internal investigations. It also cites another, BCATS, a database for complaints about misconduct falling outside respondent's patrol guide. And apparently respondent has identified certain databases as well. Now that petitioner has information about specific databases, it can make appropriate FOIL requests.

The affidavit from Assistant Chief Veneziano (NYSCEF Doc. No. 36) also supports the Court's conclusion that the petition should be dismissed. Veneziano notes that there are multiple systems in which these records are kept and that there are over 500,000 documents in these systems (*id.* at 1-2). While this Court makes no finding with respect to whether the request is too voluminous, this Court finds that a broad request to all unspecified databases about all misconduct further demonstrates the request did not reasonably describe the records sought.

Summary

The fact is that the request at issue here is too vague and overbroad for this Court to require respondent to comply. How could the Court properly evaluate whether respondent has given documents "sufficient to identify all databases"? The purpose of FOIL is to request certain documents and give the agency enough information to know where to look and what documents the requestor is seeking. A vague request that seeks information from unspecified databases over an unlimited time span creates too much ambiguity for respondent to fully and sufficiently respond.

The Court recognizes that petitioner may not have known the exact names of those databases when it made the initial request and the Court is aware that respondent identified certain specific databases in its papers. Clearly, respondent could have tried to reach a settlement in which it produced documents from the databases it knows it has. But this Court cannot force the parties to settle; it can only consider the papers before it and respondent's denial was justified

under the applicable case law. However, now that petitioner knows which databases to ask about, it can make more targeted requests that give respondent a chance to look in those databases for records.

The larger point is that FOIL should not be confused with an ordinary discovery device that might be utilized in a plenary action. FOIL simply requires an agency to turn over records it has in its possession, subject to certain exemptions. It does not provide for an agency to guess where to look or to turn over documents sufficient to support a theory espoused by petitioner. A party seeking documents must ask for specific documents.

Accordingly, it is hereby

ORDERED that the cross-motion (MS001) to dismiss by respondent is granted; and it is further

ADJUDGED that the petition is denied, this proceeding is dismissed and the Clerk is directed to enter judgment accordingly without costs or disbursements upon presentation of proper papers therefor.

ORDERED that the motion (MS002) by non-party the Police Benevolent Association of the City of New York to intervene is denied as moot.

3/1/2022
DATE


ARLENE BLUTH, J.S.C.

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

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GRANTED

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DENIED

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GRANTED IN PART

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OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

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REFERENCE